

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KAI ANDREW BANNON,

Defendant and Appellant.

B276860

Los Angeles County
Super. Ct. No. BA429425

APPEAL from a judgment of the Superior Court of
Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters,
Assistant Attorney General, Shawn McGahey Webb and
Kathy S. Pomerantz, Deputy Attorneys General, for
Plaintiff and Respondent.

After all four victims testified at trial and Kai Andrew Bannon testified in his defense, a jury convicted Bannon of eight counts: one count of sodomy of an unconscious victim, one count of rape of an unconscious person, five counts of forcible rape, and one count of sodomy by use of force. The jury found true a multiple victim special circumstance on seven counts. The trial court denied probation and sentenced Bannon to a determinate 10-year term, and an indeterminate term of 60 years to life.

Bannon appeals, arguing the trial court violated his right to due process and a fair trial when the court denied his motion to sever, admitted evidence of a prior sexual offense, erroneously instructed the jury, and allowed expert testimony on rape trauma syndrome. We affirm.

BACKGROUND

An amended information, filed June 7, 2016, charged Bannon with committing eight felonies in 2012, 2014, and 2015: one count of sodomy of an unconscious victim, River L. (Pen. Code, § 286, subd. (f)) (count 1); one count of rape of an unconscious person, Crystal M. (Pen. Code, § 261, subd. (a)(4)) (count 2); five counts of forcible rape of Crystal M. (count 3), Megan L. (count 5), and Carolyn B. (counts 6, 7, and 8) (Pen. Code, § 261, subd. (a)(2)); and one count of sodomy by use of force of Megan L. (Pen. Code, § 286, subd. (c)(2)(A)) (count 4). The information alleged a multiple victim special circumstance as to counts 2-8 (Pen. Code, § 667.61, subds. (a) & (e)), and alleged Bannon committed counts 6, 7, and 8 against Carolyn B. while out on bail (Pen. Code, § 12022.1). Bannon pleaded not guilty.

1. *Count 1 (sodomy of an unconscious victim), River L.*

River testified that on the evening of July 18, 2014, she drove to her friend Julee's apartment and had a drink. At around 9:00 p.m., Julee drove them to a club, where they sat in a booth with Julee's friend Chris and his friends, one of whom was Bannon. River ordered a vodka drink.

After some conversation, River got up to have a cigarette. Julee, Chris, and Bannon went outside with her. When they came back in she sat next to Bannon. She ordered another drink, and Bannon asked to taste it. She handed it to him and did not watch him. He handed it back. River thought Bannon was gay, but she changed her mind when he put his arm around her for a group photograph.

The group left the club and Bannon drove Julee's car to another bar. Bannon sat next to River in the booth again, and seemed to hover more than before. She and Bannon decided to get more drinks, and she offered to buy. He told her to put the drinks on his tab, but she got up and got the drinks, paying for them herself. The group began to talk about music, and River and Bannon continued the conversation. She took a few sips of her drink.

The next thing River remembered was waking up naked in the dark, lying on her stomach with an extreme pain in her rectum, and crying: " 'Please stop, please stop.' " She felt a large object going in and out of her rectum that she believed was a penis, and heard heavy breathing. Bannon said: " 'It's okay. I'm almost done[,] ' " and the thrusting continued. River's next memory was waking up again, lying on her left side and looking at a wall and a ceiling. She had no idea where she was, or how she had lost her clothing.

River used her phone to text her mother. Bannon, who was behind her, woke up, turned around, and put his arm around her. He began vaginal intercourse with her from behind. River did not stop him. She was disoriented and thought “it was a better idea not to act like anything was amiss. I felt I would get more answers if I just remained calm.”

River felt heavy, slow, and sluggish. She was nauseated and embarrassed “because, I mean, I didn’t know this person.” She was not sure why she was unable to move, thinking she might be under the influence of a “ruffi.”

Bannon ejaculated inside River. He handed her a towel. She wiped off her thigh, wrapped the towel around herself, and went to the bathroom. She was still unsteady on her feet and confused, and could not remember leaving the bar or driving anywhere. She threw up. In the mirror she saw dried blood in both nostrils, and her makeup was smeared. She cleaned up her face and went back into Bannon’s room and into bed. Thinking if she stayed “easygoing and almost joking about it” she would get some answers, she said something like, “ ‘Oh, if this is what it’s like to be drugged, then everybody should get drugged.’ ” Bannon chuckled, told her they had been making out in the Lyft on the way to his apartment, and “you seemed fine.”

After awkward silences, they had sex again (she “just kind of went along with everything,” in “an instinctual survival mode”), and slept off and on. River texted Julee, who had been looking for her since about 10:30 a.m. and was worried, writing: “ ‘I’m fine. No memory of getting here, though. . . .’ ”

River needed to get to work, but her car was still parked at Julee’s, and Bannon offered to drive her there. River asked where her purse was and Bannon brought it to her, saying it was

in the kitchen; she never left her purse anywhere, especially in a stranger's place. Walking to the car, and as Bannon drove her to Julee's, River kept saying, " '[I] don't remember seeing this [or] that,' " still hoping to get answers.

On the way to Julee's, River started to feel soreness in her rectum. Once in her own car, she started to feel intense pain. She was very dehydrated and stopped for a soda and water. She went to work, thinking, "[i]f I kept things normal, then maybe things were normal." She became more aware of her pain, and was unable to walk properly or sit down; she was frightened.

River asked her best friend, " '[h]ave you ever been rufied before?' " because she thought maybe she had been "rufied." The next day, Sunday, July 20, River talked to Julee and decided that she would report. Julee went with her to the hospital, where River underwent a sexual assault examination and an interview with police.

On cross-examination, River testified that in talking to the police and to the nurse she "incorrectly used the term 'consensual sex' " to describe the intercourse with Bannon after the anal intercourse. She told the nurse that Bannon had seemed like a nice guy, and she told the police she and Bannon kissed goodbye and exchanged phone numbers, and he later sent a friendly text message.

The nurse who interviewed and then examined River at the hospital on July 20 testified River had a laceration in the anal area that was still open and painful, indicated "penetrating trauma," and was consistent with River's account of events. The jury saw photographs of the injury. River told the nurse she had lapses in her memory, did not remember how she got to Bannon's

apartment, came to when she felt pain to her anus, and passed out again during the assault.

2. *Counts 2 (rape of an unconscious person) and 3 (forcible rape), Crystal M.*

Crystal testified that on February 8, 2012, she had recently arrived in the United States from Australia, and was looking for a place to live. She responded to Bannon's Craigslist ad for a roommate and drove over to Bannon's apartment at around 10:00 p.m., after having two beers with her current roommate. He invited her in, and after a tour and general conversation, he suggested they walk to a bar in the area. At the bar, Bannon asked her questions about her sex life, but Crystal was not romantically interested in Bannon and the questions made her uncomfortable. At about 1:00 a.m., after she ran into her current roommate (who did not know she was looking for another apartment), she and Bannon headed back to Bannon's apartment, stopping by Crystal's current place so she could change out of her work clothes.

Crystal had had about three vodka drinks and she felt moderately intoxicated. She was not sure she was comfortable driving, so she went into Bannon's apartment, where he offered her another vodka drink. When Crystal said she was tired and stressed, Bannon offered to give her a massage; nothing about his offer made her think he was suggesting they have sex. She suggested the living room and he said it would be better for her to lie down in his bedroom. They went into the bedroom and he asked her to take her shirt off. She removed her shirt, lay face down, and pulled the shirt around her, still wearing her pants and underwear.

The next thing she remembered was coming to in confusion, naked. Bannon was on top of her, thrusting his penis inside her vagina. He was holding her wrists above her head and pinning her with his knees. She did not remember any discussion or consent being given, and “the last thing I wanted to do was have sex with anyone,” as she had recently been diagnosed with herpes.

Crystal repeatedly cried and screamed, “ ‘No, stop[,]’ ” struggling to get Bannon off her and trying to close her legs. Bannon just kept going. She turned her head to the right and saw the clock said 2:00 a.m.; she again lost consciousness. She woke up again at 4:00 a.m., in the exact same position with Bannon still inside her. Crystal kicked, screamed, and yelled, managing to get Bannon off her. She was crying uncontrollably. Bannon asked why, and she answered: “ ‘Because I said, “No.” ’ ” She tried to get out of the bed but he grabbed her and held her.

Bannon fell asleep, and she freed herself and left the bed. She found her pants and her shirt but not her underwear, and left the bedroom with a sheet from the bed and her glass from the bedroom table. Crystal thought there might have been something in her drink and instinct told her to take the glass. She dressed in the living room. Bannon asked, “ ‘Why are you leaving?’ ” She left without responding and got into her car, noticing it was 4:30 a.m.

Crystal went home to bed, and then went to work, where she realized she did not have her phone. She left work at lunch, “upset that I had just been raped,” was far from her home in Australia, and did not have her phone. She went to her apartment and cried for a long time. When her housemate came home, she drove Crystal to Bannon’s apartment. He answered

the door and acted as if nothing had happened. Scared and terrified, Crystal went inside. Bannon gave Crystal her phone, and she returned to her apartment.

The next day at the office, Crystal talked to two coworkers, who were outraged and wanted her to get medical assistance. Crystal wanted to crawl into a hole and go to sleep. She went home and to bed.

The next morning, February 11, 2012, she called a rape crisis hotline. “I realized I wasn’t dreaming, that it had happened, and that I couldn’t cope with its effect on me on my own, that I needed help.” At the hospital, she spoke to police officers and went to the rape treatment center, where she spoke to a counselor and underwent a sexual assault examination. She gave them her clothes, the sheet, and the glass, which she had brought with her in a plastic bag. She told the nurse she woke up with Bannon’s penis inside her and started screaming, “‘No[,]’” tried to fight him off, but passed out again. She had three abrasions on her left hand.

Crystal had additional police interviews on February 16, 2012 and September 5, 2014.

Crystal filed a civil suit against Bannon after the police investigation went nowhere, and the district attorney initially declined to prosecute. She received a default judgment. She did not know any of the other victims in the criminal case.

Crystal struggled with what had happened and the decisions she had made, feeling “incredibly responsible” and traumatized. She began to abuse alcohol until she was arrested for driving under the influence. She no longer abused alcohol.

3. *Counts 4 (sodomy by use of force) and 5 (forcible rape), Megan L.*

Megan testified that she was 20 years old on the night of March 31, 2014, when she drove her friend Jazmine to a restaurant/bar in Hollywood for a friend's going-away party. Megan was standing by the bar with a beer when Bannon walked up and they began to talk. Bannon brought her three to five mixed drinks containing vodka. They sat down at a booth with Jazmine. She was attracted to Bannon, and they kissed. She did not usually drink that much, and she began to feel "very out of it and just drunk" and unable to drive.

Driving Megan's car, Bannon took Megan and Jazmine to his house. Megan was happy to be there, and she was interested in Bannon. They kissed on the couch and then he led her to his bedroom. They lay down on the bed. Bannon took Megan's and his own clothes off, and they had intercourse, first with Bannon on top, then with Megan on top, and then from the side.

Jazmine knocked on the bedroom door. Megan, still feeling the effects of the alcohol, answered: " 'I'm not available right now.' " After a while, she started to sober up and Bannon got more aggressive. Worried that they were not using protection, she told Bannon she did not want to continue. Bannon ignored Megan and used his weight so she could not move. She told him again she did not want to continue, and called for Jazmine three times with no answer. (Jazmine told Megan the next day that Bannon had arranged for an Uber to take Jazmine home.) Bannon put his hand over Megan's mouth and nose, and she felt terrified. She did not know what Bannon was capable of and she did not want to upset him, thinking if she just kept going it would be over and she could leave.

Bannon told Megan to turn around because “he was going to put it in my ass.” She had never done that before, and said, “No, you’re not going to do that[,]” but he flipped her onto her stomach. Bannon tried to put his penis in her anus, and managed to insert it about an inch. It hurt, and she started to cry; Bannon kept trying. Megan was scared, wanted it to be over with, and did not know what to say or if she could do anything. Bannon was a lot bigger than she was and “he could have hurt me.”

Bannon flipped her onto her back and put his penis back in her vagina. Megan was “trying to figure out how I could leave.” The intercourse continued for a long time. Then Bannon stood by the side of the bed and told Megan to open her mouth. She complied, afraid he might hit her and thinking that if she went along with him he would be satisfied and she could leave. Bannon ejaculated into Megan’s mouth. Disgusted, she spit it out on the bed.

Megan got up to use the bathroom, and Bannon told her to be quiet because he had roommates. Megan called Jazmine several times but got no answer, and left a voicemail message that she had just been raped.

Megan left the bathroom, found her car keys, grabbed her clothes, went out the back door, and got into her car. The driveway was narrow and Bannon came down to help her back out. Megan was shaking and crying, and told Bannon: “ ‘When a girl says, “No,” you can’t keep going. You can’t do that.’ ” Bannon answered, “ ‘Was it not consensual?’ ” He moved her car for her, and she drove home.

It was close to 5:00 a.m. Megan spoke to Jazmine, and decided to drive to the emergency room; she felt sick to her

stomach, her vagina and her anus hurt, there was blood in her underwear, and she wanted to be sure she did not have a sexually transmitted disease. She arrived at the hospital around 7:00 a.m. and told the nurse she had been assaulted. The nurse examined her and told her the sheriff would come and take a report. The officers arrived and spoke with her. Later, a sexual assault response team nurse did a second examination, examining her vagina and anus, and took photographs; Megan was grimacing and crying. The examination showed tears to the area below the vaginal opening and in her anal folds, consistent with the events Megan described.

Megan later identified Bannon in a photographic lineup. She did not know, and never spoke to, any of the other alleged victims.

Jazmine testified that she, Megan, and Bannon each drank another beer after they arrived at Bannon's house. After Megan and Bannon had been in his room for a while, Jazmine knocked on the door and asked if they could get going, but Megan did not answer. Jazmine went outside to smoke a cigarette. She came back in and knocked again, and Megan said: " 'Hold on, Jazzy.' " Irritated, Jazmine went back outside to smoke, and tried to call someone to pick her up. Bannon came out in his boxers, saying Megan wanted to stay. He called Jazmine an Uber, and she went home. She woke up the next morning to voicemail and text messages from Megan, who was crying and saying she had been raped. Jazmine called Megan and met her at the emergency room.

A sheriff's deputy testified that at the hospital, Megan told him that at one point she wanted to stop having sex with Bannon

and tried to get up and off the bed. Bannon pushed her shoulders with both his hands to keep her down on her back.

4. *Counts 6, 7, and 8 (forcible rape), Carolyn B.*

On Friday July 17, 2015, Carolyn met her friend Ellen at a bar and had a glass and a half of wine. Carolyn knew Bannon socially through Ellen. She had kissed Bannon once at Ellen's birthday party, but had no interest in him. As arranged, Bannon showed up at the bar to take the women to a house party in an Uber at around 11:00 p.m.

Bannon introduced Carolyn around, and she had another glass of wine. They went into the living room to watch a pilot of a show the owners of the house worked on. Carolyn sat next to Bannon. When the party started to break up around 1:00 a.m., Ellen left with another couple, and Bannon offered to share a ride with Carolyn back to her car. When they arrived at her car, Bannon insisted she was too drunk to drive and he would drive her home. She told Bannon at least three times: " 'If you're coming over, there is absolutely no sex[,]'" and he agreed. Bannon drove her to her apartment and they went inside.

Carolyn went into the kitchen for a glass of water. Bannon entered and started kissing her; she kissed him back. She went into the bathroom to brush her teeth, put on her pajamas, take out her contacts, and wash her face. He banged on the door, and when she came out he was in her bed with the sheet pulled up. He asked, " 'Pajamas?'" and she said, " 'Yes, pajamas. I'm going to bed.'" She got under the sheets and Bannon started kissing her again, but she said she just wanted to go to bed. Bannon tried to take off her shirt and she said no, but he kept trying and she kept pulling it back down. He then tried to pull down her shorts. She pulled them back on and told him he was " 'such a

jerk’ ” and “ ‘disrespectful.’ ” She repeated she wanted to go to sleep, and he stopped, but then he began again, managing to remove her shirt, shorts, and underwear even though she said no, and tried to pull them back on.

Bannon put his penis inside her vagina, but Carolyn said, “ ‘Stop, no[,]’ ” and pushed him with her hands. He stopped, and she got up, took her pajamas and underwear, and went into the bathroom to wash herself off. She put her pajamas back on, returned to the bedroom and repeated that she just wanted to go to sleep. Once again, Bannon repeatedly pulled her clothing off and put his penis inside her again, although she kept saying no, and pushing him with her hands. Bannon pleaded and asked if she was sure, and she said, “ ‘Yes, I’m sure. . . . I just want to go to sleep.’ ” He stopped and she went to the bathroom and washed up. She returned to the bedroom and said, “ ‘You should just go[,]’ ” but he did not. By then it was 4:00 or 5:00 a.m., and she got into the bed. They slept a little, with Bannon hugging her tightly and her squirming away. At some point, as a survival technique to avoid intercourse, she offered oral sex, and he said okay. She performed oral sex, he ejaculated, and she thought he would go to sleep. They both fell asleep. She also gave him a hand job at his request, hoping she could “preserve what little, you know, of me I have left.”

It started to get light outside, and “the whole process started again,” with Bannon trying to have vaginal intercourse with Carolyn. She tried to discourage him, saying she was not on birth control and did not have a condom. He told her he had just had a test for sexually transmitted diseases and he could show her the results on his phone; she answered it did not matter because she did not want to have sex with him. He persisted,

saying he could go to the store and get a condom. She said okay, thinking she could lock him out if he left. Bannon started to get dressed, but Carolyn realized that if she locked him out he could cause a ruckus in her apartment building, and told him, “ ‘You should just really go.’ ” He said no, got undressed again, and got into bed.

For a third time, Bannon pulled down her shorts; she said no, and pulled them back up. Bannon said, “ ‘You’re gonna lie here and enjoy this[,]’ ” performing oral sex on her. Carolyn felt more and more like she had relinquished control. She was in a “zombie state” and she did not fight back. Bannon then tried to have vaginal intercourse with her again while she protested and said no. They fell asleep briefly, and then her alarm went off.

Carolyn got up and went to the closet to get her clothes, and Bannon said he would get an Uber. He had left his phone in Carolyn’s car, and she went down to get it while he was in the bathroom. They waited at the kitchen table; he asked for her number, and, “trying to act like everything was fine,” she gave it to him. He said, “ ‘I understand if you won’t answer my text.’ ” He kissed her goodbye and left in the Uber.

Carolyn did not know what to do. On Monday, still in a fog, she called a hotline and, at their suggestion, she called 911. LAPD Detective Martin Pinner testified he met Carolyn at a center for sexual assault treatment services, and she gave him handwritten notes. He suggested she call or text Bannon as a pretext, to see if Bannon might talk about what happened. Carolyn was hesitant, but she agreed, and she texted and called Bannon under Detective Pinner’s direction.

Ellen testified that she had planned to leave the party with Carolyn, and she took Bannon aside and told him not to go home

with Carolyn. Bannon said: “ ‘Nothing is going to happen.’ ” Ellen left with other friends. The next day, Saturday, Ellen called Carolyn after listening to a voice mail in which Carolyn was crying. Carolyn told Ellen that Bannon “ ‘basically raped me,’ ” and recounted the events of the night before. On Sunday, Ellen met with Carolyn, who was shaking and crying. Ellen urged her more than once to call the police.

5. *Evidence of other crimes (Emily D.)*

Emily testified that when they were both around 20, she and Bannon were friends and work colleagues. Emily was openly gay. When Bannon needed a place to live he moved into Emily’s studio apartment for some months and paid half the rent.

In June 2001, Emily invited Bannon to go out to hear a band at Universal CityWalk. He drove them to the venue and they ordered drinks. Emily had at least one martini and felt dizzy and woozy (“[e]verything was spinning”). The next thing she remembered was waking up in her apartment, completely naked on the futon where Bannon slept. Bannon was moving his fingers in and out of her vagina, and she could feel his penis rubbing against her backside. She did not remember leaving the club or returning home.

Emily froze; she could not believe what was happening (“he was my buddy”). She rolled over into a fetal position and dislodged his fingers. Bannon got up to go to the bathroom. Emily fell asleep and woke up in the morning next to a naked Bannon. Emily said: “ ‘Oh my god. Why am I naked?’ ” Bannon replied: “ ‘Don’t worry. We didn’t sleep together[,]’ ” and said he had given her a back rub. They got up, had a couple of vodka shots (“[b]ecause we were young and stupid”), and prepared to go to work.

Emily confided in a work colleague, but did not report the 2001 incident until September 2014, because she did not trust the legal system. She and Bannon continued to live together for a month or two and never discussed it again, pretending it did not happen.

6. *Expert testimony*

Prosecution expert Dr. Mindy Mechanic, a professor of psychology, testified about counterintuitive victim behavior. Victims often react in ways outsiders find surprising or hard to understand. The “stranger danger” stereotype of sexual assault assumes that sexual assault is committed by strangers who use force to overcome strenuous resistance by the victim, who is injured or fears for her life, and afterwards immediately calls the police and seeks medical help. Research shows, however, that sexual assaults committed by someone the victim knows are less violent, and the resistance of the victim is proportionately less strenuous. Such assaults can be “unacknowledged,” meaning that the victim does not immediately conclude the experience was sexual assault and so does not immediately report. Women often resist being labeled a victim and delay calling the police. They feel shame, stigma, and blame, and know reporting will result in many personal questions. Further, trauma victims do not disclose all details of what happened at once, and the full account will emerge over time.

During a traumatic event such as a sexual assault, victims sometimes disassociate or freeze, and the senses of time, place, and self become distorted, interfering with the formation of memory. The human reaction to trauma is to “fight, flee, or freeze” in an attempt to survive. The choice is reflexive. Although the expectation is active resistance, that sometimes

increases the victim's injuries. In sexual assaults, the victim may comply or even offer to do something sexual to avoid vaginal intercourse and take as much control as possible. A victim may choose to comply after pushing the person away or saying no. Compliance is sometimes the safest course of action, is more likely when the attacker is someone the victim knows, and is very different from consent.

7. *Defense evidence*

Joseph G. testified that he was sitting in the booth with Bannon and the others when River and Julee joined them. River and Bannon paired off to converse and seemed interested in each other. When Joseph noticed bruises on River's legs and asked her how she got them, she answered that she drank too much the previous weekend, and " 'I passed out. And I fell down, and I woke up. And here they are.' " On their way to the second club, River asked Joseph whether Bannon was single, and said she thought Bannon "was really hot." River also asked Joseph if Bannon was gay and if he and Joseph were a couple.

River and Bannon were making out at the second club, and then urged the rest of the group to go home without them. River said she would take a Lyft home if she had to. After heading to the parking lot, Julee and Joseph returned to make sure that River had a ride home. River said she was totally fine and they could leave without her. Joseph never saw River have any trouble speaking or walking.

Julee's friend Chris testified he had been friendly with Bannon for ten years. Julee and River arrived at the first bar and sat down with Chris and the others, and eventually River ended up next to Bannon. At the second bar, River and Bannon sat next to each other and seemed fond and happy. They stayed

behind at the bar when Chris and the others left. Julee was concerned about River before leaving, and tried to contact her from Chris's house. Chris received a text from Bannon saying everything was okay. Later, Chris called Bannon to let him know that there were allegations against him, and Bannon acted surprised, saying he had sex with River twice.

8. *Bannon's testimony*

Bannon testified that all the charged sexual activity was consensual and the four women were willing participants.

a. *Megan L.*

Bannon met Megan in 2014 when she was at a bar for a friend's party. They started talking standing by the crowded bar; he was drinking a vodka soda, and she had a beer. Bannon bought her and Jazmine vodka sodas. He and Megan paired off and she invited him to sit at a booth with her friends so they could talk more easily. Bannon told Megan and Jazmine to put their drinks on his bar tab. He and Megan were "definitely flirting." He bought Megan a total of four vodka drinks, and they ended up making out in the photo booth.

Bannon invited Megan and Jazmine to come to his house for a drink. Bannon drove Megan's car to his apartment, so that if anyone got a DUI, it would be him. At his apartment, he made another round of vodka drinks; by then it was 2:00 a.m. Jazmine went out on the porch for a cigarette, and he and Megan started making out on the couch.

He led Megan into the bedroom, where they made out on the bed and took their shirts off. He unhooked her bra and she took it off, and eventually they were both naked. They started having sex, first in the missionary position, with Megan on top for a time, and then in a variety of positions. Megan was

enthusiastic and noisy. Thirty or forty minutes later, Jazmine knocked on the door and called Megan's name. Megan, who was then on top, covered herself with a pillow and responded that she was busy. They continued to have sex in a variety of positions, and after another half-hour Jazmine knocked on the door again. Megan whispered to him that Jazmine wanted to go home. Bannon told her he would pay for Jazmine's Uber. He put on his boxers, went out to call an Uber for Jazmine, and returned to the bedroom to resume having sex with Megan.

Bannon was spooning Megan and having vaginal sex with her from behind when he told her he wanted to have anal sex. She responded: " 'Okay.' " She leaned back into Bannon until his penis entered her anus and he thrustured a few times, and then she said it felt weird and she wanted to stop. He asked if she was sure because it was " 'really hot,' " and she said she had not done it before and she did not like it, so he said okay and pulled out. Bannon then put his mouth on Megan's vagina, and then they had vaginal sex again. He told her he was close to ejaculating and she told him to come on her breasts. When he moved toward her breasts she put her mouth on his penis. He ejaculated, and she swallowed. He gave her a towel and poured her a glass of water.

Megan got up, dressed, and used the bathroom. Bannon got dressed and used the bathroom. When he came out, Megan was on the couch and he curled up next to her. He kissed the back of her neck and she got up, picked her keys up from the floor, and said it was time for her to go home; it was 4:00 or 5:00 a.m. Bannon said he would help her get out of the narrow driveway, and went downstairs with her and moved her car. He got out of the car, she got in, and said "something about me

being like a selfish lover.” He apologized, and she said: “ ‘You know, if a girl doesn’t want to do something, you should listen.’ ” Bannon was confused and said: “ ‘Wasn’t it consensual?’ ” Megan drove away; they did not exchange phone numbers.

b. *Crystal M.*

Bannon met Crystal in February 2012 through his Craigslist ad for a roommate. She arrived at his apartment a little after 10:00 p.m. after having drinks with friends. Bannon offered her a vodka drink and had one himself, and he showed her the apartment; he got the impression that the small closet was a “deal-breaker.” They then walked to a neighborhood bar. Bannon thought he might be interested in Crystal, and had the impression she was interested in him. They each had three vodka sodas at the bar and the conversation was “more flirty.” She offered to buy him a fourth drink and he suggested they go back to his apartment where he could make the same drinks. Crystal was touching him and leaning in closely, and their conversation was “flirty and sexual in nature, sometimes explicitly so.” Bannon was “buzzed.”

They left the bar, and stopped at Crystal’s home, where she changed clothing in front of Bannon and then grabbed a toothbrush, putting it in her purse. They returned to Bannon’s apartment, and he began to fix drinks. Bannon left to use the bathroom, and when he returned Crystal had made the drinks, which were very strong. They talked for a while in the kitchen and living room, and Bannon put his arm around Crystal and massaged her neck. He asked if she wanted a massage, and she agreed. They walked to his bedroom, where Crystal sat down on the bed, took off her shirt, and lay down on her stomach.

Bannon took off his shoes and straddled Crystal. He massaged her back and her breasts and she seemed to enjoy it. Although his memory was not clear because “[i]t was a giant glass of vodka, and we had been drinking very heavily,” Bannon then asked if she wanted to take off her pants, and she said yes and removed them; he took off his jeans. Crystal turned around so she was facing him, and “the kind of pretense of the massage was basically over.” She arched her back and made sounds that seemed to encourage him so they started making out. Bannon took off Crystal’s underwear and kissed her navel intending to perform oral sex on her, but she said no. He took off his boxers and they continued “petting.”

Crystal said, “ ‘No, no, no. I don’t want to have sex, especially without a condom.’ ” He pulled a condom out of his bedside table drawer and opened it, but she put her hands on his and said, “ ‘No, no, no. I don’t want to have sex.’ ” She took the condom out of his hand and dropped it. After about ten more minutes of sexual activity, Crystal was on top and reached down and brought Bannon to orgasm with her hand. He got up and dried himself off with a towel, and Crystal wiped her vaginal area with her underwear. They both went to sleep.

When he woke up, Bannon rolled on top of Crystal to reach a glass of water on the bedside table. He bent down to kiss her, and she said, “ ‘Get off of me[,]’ ” obviously not happy with the situation. Bannon told Crystal it was late and she should probably get going, and went to the bathroom. When he returned she had gathered up her things and was drinking the bedside glass of water with the sheet wrapped around her. Crystal walked through the living room and out the front door. Bannon went back to bed and fell asleep.

Later that morning, a cellphone left on Bannon's couch was vibrating with text messages that appeared to be from Crystal. He texted back that he could bring the phone to her, or she could pick it up. She came by for the phone in the early evening and seemed grateful.

c. *Carolyn B.*

Bannon met Carolyn through his neighbor, Carolyn's friend Ellen. At Ellen's birthday party, he and Carolyn engaged in lively conversation and at a bar, danced and kissed. He thought the attraction was mutual.

In mid-July, Bannon invited Ellen to a party, and she said Carolyn wanted to come. Bannon cleared it with the party's host, and then called an Uber and picked Ellen and Carolyn up at a bar nearby, where they were drinking white wine. At the party, Bannon introduced the women to his friends and he sat with Carolyn to watch a pilot. He spent the rest of the evening flirting and talking with Carolyn. He drank bourbon and soda, and she had white wine and a vodka cocktail.

When the party wound down, Bannon and Carolyn decided to go to her place, and he offered to drive. They took an Uber to the bar where Carolyn had left her car. Bannon drove back to her place. The conversation turned more flirtatious and Bannon rested his hand on her inner thigh. Carolyn had told Bannon he could stay, "[b]ut no sex." He had responded, "Sure, absolutely."

Once in the apartment, Bannon used the bathroom and kissed Carolyn in the kitchen. She went to the bathroom saying she wanted to get ready for bed. Bannon stripped down to his boxers and got into her bed. He understood he could stay over

but Carolyn did not want to have vaginal intercourse, although everything else was fine with her.

Carolyn got into bed wearing a t-shirt and athletic shorts. They continued to make out, with Carolyn embracing him. He pulled down her underwear several times and stroked her vagina; she pulled her underwear back up. Eventually she seemed fine with his hand being there, and he removed her underwear without her objection. Carolyn was stroking his penis and took off his boxers. He was on top grinding his pelvis against hers, and she reacted enthusiastically. Bannon shifted his position thinking maybe they might have sex and grabbed Carolyn's hips, but she said no and flipped over so she was on top. He understood she did not want to have sex.

Carolyn kissed Bannon and then said "she wanted me to come in her mouth." She performed oral sex on him. He ejaculated in her mouth and she swallowed. She went to the bathroom to clean up, and then put her clothes back on and cuddled with Bannon until they fell asleep.

Early in the morning they started making out again. Bannon took off her shirt and underwear. When "it looked like we might have been lined up to have sex," Carolyn put her hands on his chest and pushed him gently away. He performed oral sex on her and they both fell asleep. When they woke up they started messing around, and Carolyn said: " 'We're not gonna have sex. You don't have a condom.' " He asked if she had one and she said no. He offered to go buy one, and she said there was a convenience store around the corner.

Bannon got dressed, but Carolyn changed her mind and told him she did not want to have sex. Bannon said okay and got back into bed, where Carolyn stimulated him to orgasm with her

hand. Bannon asked her if she wanted to get breakfast, and Carolyn said she had errands to run. She was dating someone else and did not usually hook up with two people at the same time. They exchanged numbers. Bannon joked that he would understand if she did not call him because she was seeing someone. Carolyn laughed, and he “got the impression that she was absolutely going to return my calls.” He left, and later texted her that he had a good time.

d. *River L.*

Bannon described meeting River and her friend Julee in July 2014 when they joined Bannon and his friends in the booth at a bar and ordered drinks. When Bannon ended up sitting next to River, they started talking. He was drinking vodka sodas and River was drinking gimlets. After River went outside for 15 minutes and returned, she and Bannon ordered their third drink, which they drank quickly because everyone decided to go to another bar that served food. Bannon thought River was interested in their conversation but did not detect any sexual interest.

Julee drove them to another bar where they again sat in a booth. River and Bannon seemed to connect better and started talking about the music business, and he sensed a physical connection and at one point kissed her. When everyone started to talk about leaving, he suggested flippantly that River should come home with him, and she surprised him by saying, “‘Okay.’” Julee did not like that idea. She and River discussed whether River should stay behind while Bannon waited at the bar. River joined him and they ordered another drink, and then Julee spoke to River again before everyone else left. He and River continued

to drink and make out at the bar until 1:30 a.m., consuming four drinks each plus a shot after Julee left.

Bannon called a Lyft, and they made out in the back seat on the way to Bannon's apartment. At Bannon's place, they had a shot of bourbon in the kitchen and then went into the bedroom. River sat down on the bed and Bannon leaned over her, and they continued to kiss as they took each other's clothes off. They "got fully naked and started having sex pretty quickly," with River on top at times as "an active, willing participant." After 25 minutes, Bannon was on his side and River was on her back, and he was entering her vagina with his penis and stimulating her with his hand. Bannon was behind River when he told her he wanted to have anal sex with her. She said nothing "but she seemed to indicate that that was fine," pushing back against him so his penis went into her anus. They switched to "a doggy position" and continued to have anal sex. After about a minute and a half she made a sound that made Bannon think she was in a little pain, and he asked her if she wanted him to stop, and she said no. Thirty seconds later, she again indicated discomfort. He asked if she wanted him to stop and she said no. He told her, "I'm really close[,] " and pulled out and ejaculated.

They cleaned themselves off with a towel and River got up to use the bathroom. He sensed nothing negative. She returned to bed and they fell asleep. When they woke up in the morning, he kissed her and she used the bathroom again. After she returned, with no foreplay, they started to have vaginal sex. They finished, cleaned up, and went back to sleep. At some point River used the bathroom again. She ran into his roommate's girlfriend, and told Bannon, "That was embarrassing." They had sex again, and then it was time to take River home. They got

dressed, and she asked him whether he would call her. He told her he would drive her home; it was around 12:30 to 1:30 p.m. He drove her to Julee's house because her car was there, and they exchanged phone numbers. River told him she thought maybe someone put something in her drink, and she could not remember the Lyft ride to his apartment. He told her to go to the hospital if she felt that way.

His friend Chris later told Bannon that River was upset and was going to the police.

e. *Emily D.*

When Bannon was 19, he worked with Emily at a non-profit. She offered to let him live in her tiny studio apartment. She told him he could crash on the futon bed with her, which he found surprising until he learned she was gay.

Bannon did not remember going to Universal CityWalk with Emily. He did remember drinking wine in the studio apartment on a hot night when Emily took her dress off and got into bed. He joined her wearing only boxers. He wondered if she was interested in him. (He knew she had had sex with men.) Bannon put his hand on her leg, which seemed okay with her, so he moved his hand to the outside of her vagina. She said very clearly, " 'Why are you doing this?' " Embarrassed, he went and hid in the bathroom until he thought she was asleep. He lived with Emily for a few months, but never tried to touch her again.

9. *Rebuttal evidence*

Julee testified that River and Bannon were just talking at the first bar and she did not see them kissing or making out at the second bar. After River left the second bar with Bannon, Julee went to Chris's place to try to connect with River. Chris

texted Bannon to ask what was going on and received a message back. Julee decided to go home.

When Julee saw River the next night, she was pale, distraught, and crying. River said she was having flashbacks, believed she had been drugged and violated, and thought she had had anal sex “against her consent.”

10. *Closing arguments*

In closing, the prosecutor argued that all the women testified to similar experiences with Bannon, during which they did not consent or they were unconscious and unable to consent. They also testified to details that were not favorable to them, which made them more credible. All ended up at a hospital, underwent physical examinations, and talked to detectives. The jury’s job was to decide who was telling the truth, the women or Bannon.

The defense argued the case against Bannon was a result of “a peculiar period of time with Tinder and Grindr, dating lines being blurred, instant hookups, and subsequent regret.” The testimony of the women was fatally flawed and not credible, and three of them had been drinking heavily at the time of the alleged sexual assaults. Bannon’s testimony had been complete and straightforward, and being “sexually adventurous” was not a crime.

11. *Jury verdict, sentencing, and appeal*

The jury found Bannon guilty on all eight counts, and found true the allegations in counts 2 through 8 that Bannon committed the offenses against more than one victim. Bannon

admitted the allegations in counts 6, 7, and 8 that he committed the 2015 offenses against Carolyn while released on bail.¹

At sentencing, Crystal and River gave victim impact statements, and Bannon made a statement apologizing to the four women. The trial court found Bannon ineligible for probation under Penal Code section 1203.065 and sentenced him to a determinate term of 10 years, and an indeterminate term of 60 years to life. Bannon filed a timely notice of appeal.

DISCUSSION

1. *The trial court’s denial of the motion to sever did not affect the jury’s verdict and make the trial grossly unfair*

Before trial, the prosecution moved to join case number BA438444, which alleged the offenses involving Carolyn, with case number BA429425, which alleged the offenses involving River, Megan, and Crystal. The defense withdrew its objection to the joinder, and the trial court granted the joinder motion. Bannon then filed a motion to sever, arguing the prosecution “linked four *weak* cases against him into a single unified action in order to take advantage of the *number* of women making claims against him,” prejudicing his right to a fair trial. Bannon argued he was entitled to four separate trials with four separate juries.

At the hearing on the motion to sever, Bannon’s counsel argued that the effect of combining multiple women’s claims of sexual assault “is really a tsunami of prejudice against an

¹ At sentencing, Bannon’s counsel stated: “It is beyond logical explanation that he could have allowed himself to become involved in the counts involving Carolyn B. at a time when he was on bail in the existing case involving the other three young women.”

accused person” and served to label Bannon a predator, especially when four different women make “substantially similar or identical claims.” Each of the four cases had flaws and combining them gave them a strength to which they were not entitled.

The trial court observed there had not been a motion to sever the charges involving the three women in BA429425. The defense agreed that Evidence Code section 1108² allowed propensity evidence in sexual assault cases, but argued that section 1108’s effect was diminished when there were multiple victims. Although the jury would be instructed to consider each charge separately, human nature would make it difficult for the members of the jury to so restrict themselves. The prosecutor responded that the issue was not whether there were multiple victims, but whether one count, or one victim, was more likely to inflame the jury against the defendant. Here, the four women described very similar acts and events. Further, if Bannon testified (as the defense had indicated he would), the separate acts would be cross-admissible to impeach Bannon or any defense character evidence. Judicial economy would be served by a joint trial.

The trial court stated that if there were four separate cases, the other charges could come in under sections 1101 and 1108 under a preponderance standard. Trying them all together would benefit the defense by subjecting each victim’s charges to the beyond a reasonable doubt standard. The prejudice from joinder was not undue under section 352. The court denied the motion to sever.

² Unless otherwise indicated, all subsequent statutory references are to the Evidence Code.

Penal Code section 954 allows the joinder of charged offenses connected together in their commission or belonging in the same class of crimes. “[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law.” (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) A defendant challenging a joint trial can prevail only by making a clear showing of prejudice to establish that the trial court abused its discretion when it denied the severance motion, based on the record before the trial court when it made its ruling. (*Ibid.*) We consider whether the evidence would be cross-admissible in separate trials, whether some of the charges would be likely to unusually inflame the jury, and whether a weak case has been joined with a strong case, or with another weak case, so that the evidence in a joint trial would alter the outcome of some or all of the charges. (*Id.* at pp. 1220-1221.) If the evidence would be cross-admissible in separate trials, that alone is usually sufficient to dispel any prejudice and justify the trial court’s refusal to sever the charged offenses. (*Id.* at p. 1221.) A jury may consider properly admissible “other crimes” evidence if it finds by a preponderance of the evidence that the defendant committed those other crimes. (*People v. Scott* (2011) 52 Cal.4th 452, 470.)

Bannon concedes that the charged offenses were in the same class of crimes. He acknowledges that section 1108 carves out an exception to section 1101, permitting admission of evidence of other sex offenses in a sex crime prosecution if section 352 does not bar the admission as unduly prejudicial. (See *People v. Daveggio* (2018) 4 Cal.5th 790, 823.) Given this cross-admissibility, he also concedes that the trial court did not abuse its discretion when it denied the motion to sever on the

evidence before it at the time. Nevertheless, he argues that *after all* the trial evidence, joinder *actually* resulted in gross unfairness that deprived him of due process and a fair trial, “as it is clear the jury could not decide each individual case on their own merits.” Bannon has the burden to establish gross unfairness, which is a “‘high burden.’ . . . [D]efendant must demonstrate a ‘reasonable probability’ that the joinder affected the jury’s verdicts.” (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1438.)

Bannon points out that River and Megan conceded that some of their sexual activity with Bannon was consensual, and Carolyn stated she initiated some sexual activity to placate him. As for Crystal, he points out that her case was initially rejected for prosecution and that she had a financial stake because of her civil action against him. As a result, he contends, the prosecution joined “four weak cases” against him, which made the jury unable to weigh the evidence as to each woman to determine whether that evidence established his guilt beyond a reasonable doubt. He also argues that the prosecutor emphasized the number of victims and the similarities and patterns in the evidence, which he claims was grossly unfair.

Bannon’s arguments do not carry his high burden to show that joinder affected the jury’s verdict, and he has not established gross unfairness. While the evidence in each case was strong in some areas and less strong in others, none was notably weak. “[H]ere we are not presented with a situation where a weak case was joined with a strong case.” (*People v. Ybarra, supra*, 245 Cal.App.4th at p. 1440.) Consensual sexual activity does not negate the evidence of the nonconsensual activity testified to by River and Megan. Carolyn’s initiation of sexual activity to

placate Bannon shows her fear of Bannon, consistent with her testimony that he repeatedly had intercourse with her without her consent. The expert testimony explained that sexual assault victims can behave in counterintuitive ways, including by initiating sexual activity. Crystal's civil suit was resolved by a default judgment when Bannon failed to respond. Bannon does not explain how the initial failure to prosecute Crystal's case negates her trial testimony. Bannon does not address how the effect he complains of, including the prosecutor's remarks, would have been eliminated if each case had been tried separately. The other victims' evidence would have been admissible in separate trials.

Bannon has not shown that it is reasonably probable that trying the four cases together affected the jury's verdict, and he therefore has failed to show gross unfairness. The denial of his motion to sever did not deny him a fair trial.

2. *The admission of prior uncharged sexual offense evidence did not deny Bannon a fair trial*

Bannon's motion to sever included an opposition to the admission of uncharged offenses against three additional women, one of whom was Emily. Bannon argued his alleged uncharged behavior was not similar to the behavior in the charged offenses. After denying the motion to sever, the trial court concluded that the evidence of the uncharged offenses was not admissible under section 1101. Turning to section 1108, the court stated (and defense counsel acknowledged) that the evidence of Bannon's sexual behavior was admissible under section 1108. Defense counsel argued that the evidence should be excluded under section 352 as not sufficiently probative, as the 2001 event involving Emily was stale, she was gay, and she did not

physically resist, making the evidence dissimilar to the charged offenses. The prosecutor responded that the additional evidence was not unduly prejudicial and Emily's experience was not too remote.

The court remarked that none of the charged offenses involved violence beyond the sexual assault. While remoteness was a factor, the probative value of Emily's evidence was high given the presence of alcohol and factual similarity to the charged offenses, and the details were less inflammatory than the uncharged offenses against the other two women. The court admitted the evidence related to Emily only.

"In sexual offense cases, Evidence Code section 1108 creates an exception to Evidence Code section 1101's prohibition against propensity evidence. Under Evidence Code section 1108, when a criminal defendant is accused of a sexual offense, 'evidence of the defendant's commission of another sexual offense or offenses' is not excluded under section 1101 if not inadmissible under Evidence Code section 352." (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1115 (*Nguyen*).) The trial court retains the discretion to exclude the evidence if its prejudicial effect substantially outweighs its probative value, and we review a ruling admitting such evidence for abuse of discretion. (*Id.* at p. 1116.)

Addressing the factors listed in *Nguyen*, Bannon again asserts that Emily's evidence shared no common characteristics with the charged offenses. The trial court, however, properly pointed out that Emily, like River and Crystal, drank alcohol with Bannon, blacked out, and came to while he was sexually assaulting her. Whether Bannon used force or intimidation or whether Emily resisted is not determinative; she testified that

she “froze,” which is consistent with the victim response described by the expert witness. Emily’s experience was similar enough to the charged offenses to have probative value. (*Nguyen, supra*, 184 Cal.App.4th at p. 1117.) Bannon admits Emily’s evidence was not stronger or more inflammatory than the charged offenses. (*Ibid.*) We agree that the evidence was somewhat remote in time, occurring in 2001 while the charged offense closest in time occurred 11 years later (Crystal). (*Ibid.*) Nevertheless, the evidence was not likely to confuse the jurors and did not consume undue time. (*Ibid.*) The jury was instructed on how to consider uncharged conduct, and Emily’s testimony was not overly long.

We reverse the trial court’s admission of the uncharged evidence only “ ‘ ‘ ‘on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ ’ ’ ” (*Nguyen, supra*, 184 Cal.App.4th at p. 1119.) Emily’s evidence tended to show that Bannon had a propensity to engage in nonconsensual sexual activity with women who lost consciousness after drinking alcohol with Bannon, and who awoke to find the sexual assault underway. The admission of the evidence under section 1108 was not arbitrary or absurd.

3. *The trial court properly instructed the jury with CALCRIM No. 1191*

Bannon argues that the trial court erred and violated his due process rights when it gave the jury CALCRIM No. 1191, thus allowing the jury to convict him by only a preponderance of the evidence. As he acknowledges, his argument is foreclosed by *People v. Reliford* (2003) 29 Cal.4th 1007. “Our high court has held that CALJIC No. 2.50.01, the predecessor to CALCRIM

former No. 1191, is a correct statement of the law.” (*People v. Phea* (2018) 29 Cal.App.5th 583, 608-609 (citing *Reliford*, at pp. 1012-1016)). The instruction as given stated that if the jury found by a preponderance of the evidence that Bannon committed the crime of sexual penetration of an unconscious person (Emily), it may conclude that Bannon was disposed to commit the charged sexual offenses, but “that conclusion is only one factor to consider along with all the other evidence” and was not sufficient to prove the charged offenses: “The People must still prove each charge beyond a reasonable doubt.” The jury also was instructed that the prosecution had to prove the elements of each charged offense, and: “Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.”

“Here, as in *Reliford*, the instruction specified the uncharged offenses were not sufficient alone to prove the charged offenses and reminded the jury the People still had the burden to prove ‘every element of every charge’ beyond a reasonable doubt. Reviewing the instructions as a whole, and assuming jurors are capable of understanding and correlating jury instructions [citation], there is no reasonable likelihood the instruction on uncharged offenses relieved the prosecution of its burden of proof with respect to the charged offenses.”

(*People v. Anderson* (2012) 208 Cal.App.4th 851, 896.)

4. *The admission of expert testimony did not violate Bannon's right to due process and a fair trial*

During the hearing on the prosecution's motion to admit expert testimony on "counterintuitive behavior of sexual assault victims," defense counsel argued the testimony was inadmissible because it was not properly evidence of the effect of rape trauma syndrome, which was admissible only to show that a victim's post-assault behavior, such as a delay in reporting, was not inconsistent with having been raped. The prosecutor argued that the testimony would help to explain some behavior by the victims, such as compliance and the failure to immediately report. The court agreed compliance and delayed reporting were "appropriate behaviors about which an expert in the field of rape trauma syndrome may testify." When the hearing continued, the court ruled that the expert could testify about the following behavior by victims of sexual assault: failure to report immediately; hesitation in reporting; disconnection during the assault and its effect on memory; feeling shame and not telling anyone about the assault; and compliance during the assault. Defense counsel stated, "Okay. If that's the scope, then fine." The court emphasized that the expert could not "render an opinion as to whether or not any of these women were sexually assaulted."

Bannon argues the testimony improperly "add[ed] weight to the victims' testimony by having an expert testify their behavior conformed to the behavior of sexual assault victims," and opinion testimony by the expert that the victims were credible was not relevant or admissible. He did not object on this ground in the trial court, and so has forfeited review on appeal. (*People v. Raley* (1992) 2 Cal.4th 870, 892.) In any event, the trial

court has “broad discretion” in deciding whether to admit expert testimony, and we review for an abuse of that discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 946.) While expert testimony regarding the psychology of rape trauma syndrome is not admissible to prove that a witness was raped, it may be admissible to disabuse the jury of misconceptions about rape and rape victims. (*Id.* at p. 945 (citing *People v. Bledsoe* (1984) 36 Cal.3d 236, 247-248, 251).) Similarly, expert testimony regarding the common reactions of victims of child molestation is not admissible to prove that the child witness has been abused, but “to rehabilitate such witness’s credibility when the defendant suggests that the child’s conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation.” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.)

Dr. Mechanic did not testify that the rapes occurred, or that the victim witnesses were telling the truth. She told the jury she had not reviewed any testimony or talked to any witnesses, and knew nothing about the facts of this case. Based on her experience and research, she testified that sexual assaults by someone the victim knows are less violent and resistance less strenuous; the victim may not immediately label the experience as assault and therefore delay in reporting; and victims sometimes dissociate or freeze during the assault or choose to comply (which is not consent). This testimony helped to explain why the witnesses delayed reporting (none immediately called the police), and why some complied during parts of the assaults. The expert testimony was relevant to dispel common misconceptions about victim behavior, and its admission was not an abuse of discretion. (*People v. Housley* (1992) 6 Cal.App.4th 947, 955-956.)

5. *The trial court properly instructed the jury with CALCRIM No. 1192*

In a related claim, Bannon argues the trial court erred when it instructed the jury with CALCRIM No. 1192:

“Dr. Mechanic’s testimony about rape trauma syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not River L.’s, Crystal M.’s, Megan L.’s, and/or Carolyn B.’s conduct was not inconsistent with the conduct of someone who has been raped, and in evaluating the believability of her testimony.”

He claims this language improperly instructed the jury they could use the rape trauma testimony to evaluate witness credibility, and reduced the burden of proof in violation of his federal due process rights.

Bannon argued in his defense that the victims’ testimony was not credible, in part because their behavior was inconsistent with someone who has been assaulted. The instruction as given told the jury not to use the evidence to decide Bannon’s guilt, but also that the evidence could be used to decide whether the victims’ testimony was believable (that is, that their behavior did not mean they lied when they said they had been raped). This properly limited the jury’s consideration of the expert testimony. Appellate opinions differ on whether the trial court must always give a similar instruction (such as CALCRIM No. 1193) sua sponte, whenever there has been expert testimony regarding child sexual abuse accommodation syndrome. (Compare *People v. Housley*, *supra*, 6 Cal.App.4th at pp. 958-959, with *People v.*

Mateo (2016) 243 Cal.App.4th 1063, 1069, 1073.) No authority, however, holds that the giving of such a limiting instruction is always error, and we decline to be the first to do so. The instruction was properly given.

DISPOSITION

We affirm the judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

MURILLO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.